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AUTHOR	Redfield, Sarah E.
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ABSTRACT

This paper is part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002. It addresses the convergence of education and law. It focuses on the growth in the field of education law and the need for educators and lawyers to work together with a knowledge of each other's discipline. The paper is organized into four parts: (1) the growth of the field of education law; (2) the increasing difficulties caused for schools by such growth; (3) the institutional infrastructure that contributes to such difficulties; and (4) the advantages of reformed structures and relationships. To illustrate legal principles, the paper contains brief factual scenarios, or "stories," to show how knowledge of legal principles can help schools. The paper concludes that the relationship among lawyers, the law, child advocates, and educators has not improved commensurately with the increased presence of law in school issues. What is needed is more interdisciplinary work, more encouragement by education administration advisors for their students' interest in the law, more law professors opening their classes to educators, and more educators opening their classes to lawyers. (Contains 54 footnotes, some of which include references.) (WFA)

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The Convergence of Education and Law: A New Class of Educators and Lawyers.

Sarah E. Redfield

November 2002

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OUTLINE OF PRESENTATION

THE CONVERGENCE OF EDUCATION AND LAW:

A NEW CLASS OF EDUCATORS AND LAWYERS

Professor Sarah E. Redfield[1]

*{**Presenter's introductory note**: This presentation focuses on the growth in the field of education law and the need for educators and lawyers to work together with a knowledge of each others' disciplines. The full paper contains four parts discussing the convergence of education and law as follows: 1) the growth of the field of education law, 2) the increasing difficulties caused for schools by such growth, 3) the institutional infrastructure that contributes to such difficulties, and 4) the advantages of reformed structures and relationships. To stay within space limits, for purposes of this outline parts 3 and 4 are included dealing with the infrastructure of current methods for teaching about law and the value of improvement, and even these are included in abbreviated outline form. The conference presentation will expand on the topics. Also, anyone wishing more information should feel free to contact the author at sredfiel@maine.rr.com.}*

INTRODUCTION, TELL ME A STORY[2]

The professor just posted final grades for the class. She used the student numbers from the registrar, which happen to be social security numbers. The lists are always in alphabetical order. Some of the students complained that their privacy rights have been violated. The professor and registrar should have known?

The Titusville school district just settled a case with gay student Timothy Dahle for $312,000. Dahle, now 19, alleged that he had been physically and verbally harassed since sixth grade; the school district claimed Dahle brought the treatment on himself.[3] The case is eerily like the million-dollar case brought by

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[1] Professor Redfield is on the faculty at Franklin Pierce Law Center in Concord, NH, where she founded the Education Law Institute. She is the author of *Thinking Like a Lawyer: An Educator's Guide to Legal Analysis and Research* (Carolina Academic Press 2002). She can be reached by email at sredfiel@maine.rr.com.

[2] When I was writing this, I asked a handful of my lawyer and educator colleagues to "tell me a story" illustrating my premise that schools would operate more effectively if more educators were trained in the legal context of their work and if more lawyers were more aware of the reality of day to day life in schools. One colleague replied, "Where do I begin?" and, indeed, the stories were numerous and salient. Only a few are reproduced here, but as the rest of the article suggests, there are oh-too-many more.

[3] *Dahle v. Titusville Area Sch. Dist.*, No. 00-174 (W.D. Pa.); Dee McAree, *Gay Student Settles Harassment Suit*, The National Law Journal A6 (Feb. 11, 2002); *School District Settles,* Pittsburgh Post Gazette B-9 (Jan. 18, 2002).

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James Nabozny against his Wisconsin school district in 1997.[4] *The Pennsylvania district should have known?*

Luke, a middle school student not classified as a student with disabilities, wore an obscene T-shirt in class, and when told to wear it inside out, lost his temper and lashed out at the teacher. The principal suspended Luke for ten days (making Luke's total for the year to date thirteen days). Luke's parents asked for the school records on the incident and other disciplinary incidents involving their son and other students, the parents having previously indicated to the school that they were seriously concerned about their son's inability to control his emotions. Someone should have known?

These stories illustrate legal principles, the knowledge of which could have saved the schools involved substantial amounts of money, not to mention time, resources, and peace of mind.[5] Some such stories are straightforward, others illustrate some simple school contextual realities that would alert attorneys to factual and legal concerns. And still others are of course more complicated stories, like the last obscene T-shirt scenario that concatenates constitutional due process [6] and first amendment[7] concerns with concerns arising under the Individuals with Disabilities Education Act (IDEA)[8] and the Family Educational Rights and Privacy Act (FERPA).[9]

As these stories suggest, sometimes knowing a few basics is all that is called for; sometimes knowing when to call for expert advice is the answer; sometimes knowing the school culture and practice offers the clue to resolution. For educators and their attorneys to have the requisite information and knowledge, there is a need to define a new class of educators and a new class of lawyers, each attuned to the contextual reality of the other's discipline.[10] Such a new class will establish law-informed educators and leaders who can act preventively to avoid

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[4] *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996); *see also Sexual Harassment in Public Schools: Speeches from the 2000 HWLJ Symposium*, 12 Hastings Women's L.J. 123, 137 (2001).

[5] *See generally Limiting Your School's Exposure to Negligent Supervision and Safety Claims* (John W. McIlveen ed., LRP Publications 2001)..

[6] U.S. Constit. amend. XIV; *see generally Goss v. Lopez*, 419 U.S. 565 (1975) (constitutional due process).

[7] *See* U.S. Constit. amend. I; *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969) (symbolic black armbands cannot be prohibited absent disruption); *Catorina ex rel. Rewt v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001) (T-shirts with confederate flag protected speech under *Tinker*); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (school suspension for refusing to remove Marilyn Manson T-shirt upheld); *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (plaintiffs likely to prevail on "Straight Pride" T-shirt).

[8] 20 U.S.C.A. § 1400 et seq. (West 2000).

[9] 20 U.S.C.A. § 1232g (West 2000).

[10] The terminology "new class of lawyers, new class of educators" was coined in an interview with Dr. William C. Bosher, Dr. R. Daniel Norman, Dr. Richard Vacca, & Kate Kaminsky, Esq., Commonwealth Educational Policy Institute (CEPI), Richmond, VA; Dr. Bosher is Director and Dr. Norman, Deputy Director of CEPI; they have served as State Superintendent and Assistant Superintendent of Public Instruction for the Commonwealth of Virginia. Interview with CEPI (October 29, 2001).

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or minimize legal entanglements and act proactively to influence both litigation strategy and government policy. Such a class will also establish education-informed lawyers, apprised of both school practices and important educational research and policies, who can work collaboratively and preventively with their clients.

PART 1. GROWTH, COMPLEXITY, CONVERGENCE

Growth

- Brown v. Board of Education[11]
- Current headlines
- Lawsuits[12]
- Legislation and regulation[13]
- Constant change in law[14]
- Supreme Court issues[15]

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[11] *Brown*, 347 U.S. at 493-94.

[12] In 1960, the education law reporters published some 300 suits with schools named as parties; in 1970, it was about 700; and by 2000, over 1800. In 2001 there were a hundred federal court cases addressing just IDEA. Reported numbers for jury verdicts and judgments against schools show similar increases. These numbers are illustrative of a trend, but admittedly a superficial count. They were obtained by searching the West Education Reporter for cases with school, college or university in their titles. Of course, there are many more cases that involve these parties and school issues where the words do not appear in the title. A search in the text of cases for these same terms produces about twice the numbers. Nor do these numbers include unpublished, settled, or pending litigation. *See also* Cindy Collins, *Public Education Law ... Complex Social Issues Drive Growth of Education Law Practice*, 17 No. 7 Of Counsel 16 (1998); Todd A. DeMitchell, *The Educators & Tort Liability*, 154 Educ. L. Rep. 417 (2001) at n. 2. *But see* Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 Educ. L. Rep. 341, 351 (1997) (suggesting a plateau in litigation in 1980s and 90s).

[13] For example, Title 20, the education title of the United States Code Annotated, today occupies ten volumes. Education did not occupy its own title in the Code of Federal Regulations until 1981, when it encompassed about one thousand pages. Title 34 of the Code of Federal Regulations is now three fat volumes totaling some two thousand pages. This year, as in the past, Congress, state legislatures, and executive agencies across the country added heavily to this volume as they sought to achieve adequate education and effective school reform. The Bush administration's education bill, No Child Left Behind, is itself some 500 pages, No Child Left Behind Act of 2001, Pub. Law No. 107-110, 115 Stat 1425 (2001) (NCLB)..

[14] *See e.g.* re: religion, *Mitchell v. Helms*, 530 U.S. 793, 835 (2000), overruling *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 423 U.S. 229 (1977); *Agostini v. Felton*, 521 U.S. 203, 236 (1997) overruling *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Further development of the religion/school precedent is offered by the recent voucher cases, *Zelman v. Simmons-Harris*, 2002 WL 1378662 (U.S. June 27, 2002) (holding that Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment). *See e.g.* re change generally, *Brown*, 347 U.S. at 495 rejecting *Plessy v. Fergusson*, 163 U.S. 537 (1896) (separate but equal); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (mandatory

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- Increased lawyers[16]

Convergence

- Free speech example[17]
- School search example[18]

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flag salute). *See also Monell v. Department of Social Services,* 436 U.S. 658, 663 *overruling Monroe v. Pape,* 365 U.S. 167 (1961) (municipal liability).

[15] *See e.g. Owasso Independent School Dist. No. I-011 v. Falvo,* 122 S. Ct. 934 (2002) (holding that peer grading of class work does not violate FERPA); *Board of Education of Independent Sch. Dist. No.92 v. Earls*, 2002 WL 1378649 (U.S. June 27, 2002) (holding that drug testing students of any extra-curricular activity does not violate Fourth Amendment); *Doe v. Gonzaga U.*, (no private right of action under FERPA); *Zelman v. Simmons-Harris*, 2002 WL 1378662 (U.S. June 27, 2002) (holding that Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment). *See generally* National School Boards Association, *Pending Supreme Court School Cases,* <http://www.nsba.org/cosa/chart.htm> (accessed Feb. 2, 2002).

[16] *See e.g.* Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 Stetson L. Rev. 175 (1997); Roderick K. Daane, *The Role of University Counsel*, 12 J.C. & U. L. 399, 399 (1985); Robert D. Bickel, *The Role of College or University Legal Counsel*, 3 J.L. & Education 73, 77 (1974). *See also generally* Peter S. Popovich, *Education Law Public and Private*, 44 Educ. L. Rep. 927) (1988) (commenting on the increase in education law treatise and textual material).

[17] *See Tinker v. Des Moines Community School District, 393 US 503 (1969), Hazelwood School District v. Kuhlmeier, 484 US 260 (1988), Bethel School District No. 403 v. Frazer, 478 US 675 (1986).*

[18] *See e.g. New Jersey v. T.L.O., 105 S.Ct. 733 (1985), Vernonia 47J v. Acton, 515 U.S. 1646 (1995), Board of Education of Independent Sch. Dist. No.92 v. Earls, 2002 WL 1378649 (U.S. June 27, 2002) (holding that drug testing students of any extra-curricular activity does not violate Fourth Amendment), Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997), cert. denied, 118 S. Ct. 412 (1997).*

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PART 2. DIFFICULTIES

Litigation for public interest and reform[19]

Litigation as threat and as frustration[20]

The role of lawyers[21]

PART 3. ISSUES OF INFRASTRUCTURE

To increase the likelihood of wise decision-making and to avoid the difficulties outlined as law and education converge, many legal and education experts have written for years about the importance of educating teachers and other educators about the law.[22] A recent study of Texas educators by Dr. Mark Littleton and his

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[19] *See generally Law and School Reform: Six Strategies for Promoting Educational Equity* (Jay P. Heubert ed., Yale U. Press 1998) 9-17.

[20] "I believe that the whole focus of education has been changed by our overly litigious society. Many like to blame lawyers for over litigation, and in part, they may be to blame, but every lawyer must have a client to pursue an action. The more responsibility that we place on schools, the higher the expectation of the consumer. When the impossibly high expectations are not met, which we know that they can never be based upon the societal pressures and financial limitations described above, parents turn to litigation to try to solve the problems with education. This drains districts of resources and the attention to the educational program is diverted to defend the lawsuit. More significantly, however, educators feel as though they are under attack; the veterans with experience and expertise are fleeing to retire and many bright young people are not entering the field of education at all. This just exacerbates the problems that already exist in education. Interview by Dr. Carol Roberts with Rosemary Mullaly, Esq., Legal Department, Chester County (PA) Intermediate Unit (September 2001). *See also Selecting and Working with a School Attorney: A Guide for School Boards*, <http://www.nsba.org/cosa/About/ aboutschlaw.htm#historic> (accessed October 2, 2001); Heubert ed. *supra* n 20 at 5. The idea that school leaders must feel in control is not unique, *see* Phillip C. Schlechty, *Shaking Up the School House* 14-18 (Jossey-Bass 2001) (discussion of more government involvement in schools) ("To change a system leaders must control that system and feel that they are in control. Today many education leaders – policymakers, administrators and teachers – feel powerless…If educational leaders are to improve these systems, however, they must learn to control them; for without control there can be no systematic improvement…To improve the systems they lead leaders must first understand those systems.").

[21] Jan G. Borelli, *Who's the School Lawyer Working For?* AASA, The School Administrator Web Edition, Feb. 2000 (quoting one superintendent: "I have to admit to being blatantly naïve about the what's what and who's who of school legal operations."), <http://www.aasa.org/publications/sa/2001_02/reeves_side_lawyer_work_for.htm> (accessed Oct. 31, 2001). *See also* The MacCrate Report: Building the Education Continuum Conference Proceedings 18 (West 1993).

[22] *See e.g.* Robert J. Simpson, *Teaching Law and Education Outside Law Schools* (1975, ERIC Document ED 163826); Mark G. Yudoff, *Law and Educators: Research Past and Future* (1979, ERIC Document EJ220447); ECS Law and Education Center, *Footnotes*, December 1980 (1980 ERIC Document ED 203 455); Brenda Davis & James Williams, *Integrating Legal Issues into Teacher Preparation Programs* (1992, ERIC Document ED 347 139); *Teaching Teachers About Law in the 90s: Models, Methods, and Means* (1993, ERIC Document ED364 482); D. Gullatt & J. Tollett, *Education Law A Relevant Course for All Teacher Education Programs* (1995 ERIC Document ED 389-695); InfoGuide, School Law (1993) <http://www.lectlaw.com/files/lwr05.htm> (accessed October 17, 2001); Nathan L. Essex, *School Law and the Public Schools: A Practical Guide for Educational Leaders*, xvii (Allyn & Bacon 1999); Isaac Ersoff, *Law and the Professional Educator* (2000), <http://www.oregonvos.net/~iersoff/CenterforEducationLaw/LawandtheProfessionalEducatorBookOneAug2000/Ch

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colleagues reviewed the existing research on educator legal knowledge. Dr. Littleton concluded that while more research is needed[23] the existing research has "identified that school officials displayed an alarming lack of knowledge about legal issues that affect them on a daily basis."[24] Significantly, even where school leaders do demonstrate legal knowledge they have "difficulty applying that knowledge to situations that occur on a daily basis."[25] The Texas study is consistent with other surveys showing that educators' knowledge of core legal principles is limited and that educators themselves recognize the need to learn more about school law.[26]

Despite the many studies and reviews, the progress toward educating educators about the law seems slow.[27] Admittedly, it is difficult to gauge the advent or extent of law education required to be or in fact actually offered to educators. There is no clear system to assure such education, but rather an accumulation of standards that are diverse and largely indirect.[28] There are national frameworks, which may or may not be reflected in state aspirations, which may or may not become part of state law as statute or regulation, which may or may not be actualized into educator education schema through schools of education and other professional development providers.[29]

Relevant national frameworks and standards exist at the educator level and at the institutional level. Together they could be read to support the idea that many educators – particularly administrators and those involved with special education – need knowledge of the legal context and should be exposed to such knowledge during their own educations. But the message is not straightforward, uniform or universal. The deliver is even less clear. This part of the paper first discusses frameworks and standards of various types and levels to begin to ascertain the extent of efforts to incorporate the legal context in educating educators. Teacher, special educator, and administrator requirements are reviewed via national frameworks, state law, and schools of education. The translation from such standards to schools of education is also reviewed. Against this background, this part at least poses the question of why we find the current patchwork.

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apters/ChapterOne.html> (accessed October 17, 2001); Vicki Nord Petzko, *Preventing Legal Headaches*, Principal Leadership, 34-37, April 2001.

[23] Mark Littleton, Russ Higham & Kelli Styron, *Analysis of Legal Knowledge of School Officials in Texas*, Education Law Association 6 (2001) <http://www.tarleton.edu/~edulab/ELAPaper.doc> (accessed December 1, 2001); Perry A. Zirkel & Kathleen A. Sullivan, *Education Law Texts Usage: Survey Results*, 27 J.L. & Educ. 423 (1998) ("Despite increasing interest in education law, research regarding training in education law for teachers and administrators, remains limited.")

[24] Littleton *id* at 3.

[25] Littleton, supra n. 24 at 4.

[26] *See e.g.* Gary L. Reglin, *Public School Educators' Knowledge of School Law*, Ill. School J. (Spring 1990); Petzko, *supra* n. 22, at 34; Littleton, *supra* n. 23 at 12, 24; Louis Fisher & Gail Sorenson, *School Law for Counselors, Psychologists, and Social Workers*, 215-225 (Addison-Wesley 1996). Interestingly, the author was unable to find similar surveys of legal professionals.

[27] From anecdotal information and observation, the reverse seems equally true.

[28] Telephone interview with Pamela Ehrenberg, National Council for Accreditation of Teacher Education (April 1, 2002).

[29] This could be because of state law or because of such institutions own initiatives.

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The national frameworks are neither inherently consistent in their message nor binding across levels or among groups.

- Teachers: *Interstate New Teacher Assessment and Support Consortium (INTASC*[30] *and National Board for Professional Teaching Standards (NBPTS).*[31]

- Special education : *INTASC's Model Standards for Licensing General and Special Education Teachers of Students*[32]

- Administrators: *Interstate School Leaders Licensure Consortium's (ISLLC) Standards for School Leaders*[33]

- Schools of education: National Council for Accreditation of Teacher Education (NCATE)[34]

PART 4. A NEW CLASS

What you don't know can hurt you. The converse aphorism is also true. What you do know can help you. How can difficulties engendered by too much law and not enough knowledge of the legal context be ameliorated? What will be the benefits? To return to the opening stories, at a very basic level, for example, law education assures that the requisite internal reports and other calls are made to report abuse.[35] It assures that social security numbers

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[30] Interstate New Teacher Assessment and Support Consortium, *Model Standards for Beginning Teacher Licensing and Development: Resources for a State Dialogue (*Washington, DC: Council of Chief State School Officers 1991), <http://www.ccsso.org/intascst.html#draft> (accessed March 28, 2002). These are not standards. They are principles or models. The INTASC describes itself as a starting point for dialogue. INTASC, *id* at 1.

[31] National Board for Professional Teaching Standards (NBPTS). NBPTS reports that as of March 2002, legislative and policy action creating incentives and recognition for National Board Certification has been enacted in 48 states and in approximately 411 local school districts, including the District of Columbia. <http://www.nbpts.org >

[32] Interstate New Teacher Assessment and Support Consortium *Model Standards for Licensing General and Special Education Teachers of Students with Disabilities: A Resource for State Dialogue (*Washington, DC: Council of Chief State School Officers 2001), <http://www.ccsso.org/pdfs/SPEDStds.pdf (accessed March 28, 2002).

[33] *See* Interstate School Leaders Licensure Consortium, *Standards for School Leaders* (ISLLC) (Washington DC, Council of Chief State School Officers 1996), Standard Six. <http://www.ccsso.org/isllc.html> (accessed March 27, 2002). Thirty-four states report that they have adopted ISLLC standards or standards in close correlation with ISLLC standards. <http://www.ccsso.org/pdfs/ isllcchart00.pdf (accessed March 298, 2002).

[34] The National Council for Accreditation of Teacher Education (NCATE) is the "national professional accrediting agency for schools, colleges, and departments of education that prepare teachers, administrators, and other professional school personnel." NCATE is so recognized by the Department of Education. <http://www.ncate.org/2000/unit_stnds_2002.pdf (accessed March 28, 2002). 6. There is also The American Association of Colleges for Teacher Education (AACTE), which is "a national voluntary organization of colleges and universities that prepare the nation's teachers and other educational personnel." < http://aacte.org/Membership_Governance/intro-aacte.htm> (accessed April 4, 2002).

[35] *E.g.* Kentucky provides: "Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police…" KY ST § 620.030(1) (1999); or New Hampshire: "Any physician, surgeon, county medical examiner, psychiatrist, resident, intern, dentist, osteopath, optometrist, chiropractor, psychologist, therapist, registered nurse, hospital personnel (engaged in admission, examination, care and treatment of persons), Christian

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are not posted as student IDs. At a more intricate level, it assures that educators recognize complicated stories such as the T-shirt story as complicated.

More generally, being law-informed allows schools to avoid costly conflict and litigation, either to keep themselves out of court or to prevail (quickly) when litigation arises. As two Arizona superintendents reflected concerning how administrators respond to a threat to call a lawyer:

> Such threats often trigger superintendents or their administrative teams into a panic-driven "circle the wagons" frenzy. Their knee-jerk reaction is to immediately call the school district's legal counsel and consume billable minutes exploring the issue. While some matters require this dialogue, we suggest that superintendents who are knowledgeable about the law, understand its application to the basic principles of school operation and insist upon ongoing training of site administrators are less likely to be mired in threatened lawsuits. These superintendents are also more inclined to address the day-to-day issues with minimal consultation with attorneys.[36]

Current standards for liability for sexual harassment offer just one of many possible examples where the knowledge described by these Arizona administrators would work. A superintendent or principal who knows the law about sex discrimination will know the standard for imposing liability on the school district for harassment, including peer-to-peer sexual harassment. For the latter, the law requires that the complaining student show that the school acted with deliberate indifference.[37] Knowing the deliberate indifference standard, the administrator can address potential problems by putting in place an adequate reporting and investigating system to eliminate situations where such problems will be ignored. Since the liability will lie only where there is "deliberate indifference," a reasonable, preventive, pre-existing system for review and response to harassment claims (this does not mean all claims are valid, rather that there is a system to investigate, respond and follow up) can put the administrator in a position to avoid school liability.

Science practitioner, teacher, school official, school nurse, school counselor, social worker, day care worker, any other child or foster care worker, law enforcement official, priest, minister, or rabbi or any other person having reason to suspect that a child has been abused or neglected shall report the same in accordance with this chapter." N.H. Rev. Stat. Ann. § 169-C29 (1990). *See also* Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5101 et seq. (West 1995 & Supp. 2001); *see generally* National Clearinghouse on Child Abuse and Neglect <http://www.calib.com/nccanch/statutes/index.cfm> (accessed December 1, 2001) (referencing state statutes); Fisher & Sorenson, *id.*, at 215-225.

[36]Philip M. Corkill & J. Robert Hendricks, *Learning the Law and Loving the School Attorney Less*, AASA The School Administrator Web Edition (November 1997) <http://www.aasa.org/publications/sa/1997_11/corkill.htm> (accessed October 21, 2001).. *See also generally*, Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & Society Rev., No. 3, 713 (1999) <http://www.polisci.wisc.edu/users/kritzer/research/legalprof%5Cpostprof.htm>

[37] *Davis*, 526 U.S. at 630. *Davis* also requires that the harassment be severe and pervasive, be known to a person in a position to address the problem, and interfere with the student's ability to receive an education.

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Similarly, knowing the law allows educators to limit their liability under the typical doctrines of qualified immunity. The Titusville anecdote in the opening stories is telling. The liability standard is well illustrated by Nabozny, the Wisconsin case (of which the Dahle story at the opening appears to be a mirror image) settled in 1997 for just under a million dollars.[38] In Nabozny, Jamie Nabozny sued his school district and several school district officials for what can only be described as a long pattern of egregious treatment, which Nabozny alleged was based on his sexual orientation and gender.[39] The school's response was of the "boys will be boys" variety.[40] The Seventh Circuit Court of Appeals, in reviewing the case before it was settled, explained the standard for liability as whether the school district officials knew or should have known at the time that their actions violated the student's legal and constitutional rights. If they knew or should have known, they faced liability; otherwise, they would be entitled to qualified immunity.[41] But how many educators would have known the established state of the law on discrimination and harassment, particularly the law on equal protection and sexual preference and orientation as it stood in the 90s? Where would they have learned the law? Had they actually known (as opposed to should have known) at the time, would the administrators in Nabozny have put in place a sex-neutral system for processing complaints of harassment? That the Dahle case should be so reminiscent of Nabozny gives further grounds for consideration. After Nabozny, admittedly in a different state and circuit, how many educators should have known?[42]

In our currently litigious society, it is impossible to completely avoid being sued, but it is possible to act carefully to limit the number of suits or the grounds for litigation, and to enhance the chance for quick resolution. In the Nabozny and Dahle situations, for example, law-informed administrators and educators might well have had in place an adequate harassment policy and the whole situation might well have been resolved efficiently and without harm to the student. Similarly, administrators who know the law about due process for suspending or expelling a student, or who know the law about school searches, can, by following the correct procedures, vastly limit their potential liability..

Knowledge such as this, preventively used, can save schools and districts in both dollars and time, both of which can be better devoted to education. Indeed, armed with knowledge about the legal parameters, administrators may well choose alternative dispute resolution mechanisms. As the Arizona administrators found:

> What benefits will accrue to those who become familiar with legal issues? The most obvious is economic savings in your operations budget. A suburban district in Tucson, Ariz., recently slashed its legal expenses by 50 percent ($100,000) by proactively promoting statutory and policy awareness and

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[38] *Sexual Harassment in Public Schools, supra* n. 4 at 137.

[39] *Nabozny*, 92 F.3d 446.

[40] *Id* at 451.

[41] *Id* at 455. Thus, the critical questions in this case are whether the law 'clearly establishes' the basis for Nabozny's claim, and whether the law was so established in 1988 when Nabozny entered middle school." Immunity not found.

[42] That the Dahle case settled relatively quickly may be some indication of the answer.

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> compliance at every school site, by seeking more internal resolution and intervention, by conducting more in-house research of legal concerns and by consciously decreasing the number of "less necessary" calls to the attorney.
>
> In the past two years, not only has the district's initiative and diligence translated into significant cost savings, but the number of cases in litigation also has been reduced. Moreover, several districts we surveyed indicated a greater sense of autonomy by using legal counsel as one resource but not the key player in making decisions.[43]

This last point from the Arizona administrators seems particularly salient in the current era of "reform." Not only can knowing the law help educators act preventively and reasonably, it can help them play a clearly necessary role in litigation strategy and legal development. It is crucial that educators at all levels understand the process by which law and regulations are enacted. This will enable them to act decisively in their own spheres of expertise.[44] It will assure their voices be heard and be influential as school issues are considered and defined. It is thus very important that educators know some law basics, particularly about the various sources of law, including administrative law.

One clearly obvious example of the importance of law informed educators and education informed lawyers is IDEA, truly a legalization of an educational mission. It is useful to remember that the genesis of what is now a vast statutory and regulatory scheme was a consent order, likely drafted in the first instance by attorneys.[45] One can only speculate now as to what the schema may have been had educators written that first draft. As it stands, IDEA is extraordinarily detailed in its legal requirements, but for the intended outcomes of IDEA to be achieved will require more than just legal requirements:

> This will happen only if educators and lawyers learn to work together more effectively. The legalistic model does, in fact, have serious limitations. Due process by its nature leads schools and parents to view each other as adversaries. Schools, parents, and lawyers must learn to collaborate, not just litigate. Moreover, the dynamic interaction of school systems with the legal

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[43] Corkill & Hendricks, *supra* n. 36; Joseph R. McKinney & Theodore L. Drake, *The School Attorney and Local Educational Policy-Making*, 93 Educ. L. Rep. 476 (1994) ("The evidence indicates overwhelmingly that lawyers substantially impact local educational policy-making. Attorneys not only legitimize school policies, they initiate, clarify, write and oversee policy implementation.")

[44] Corkill & Hendricks, *supra* n. 36 ("Moreover, several districts we surveyed indicated a greater sense of autonomy by using legal counsel as one resource but not the key player in making decisions.")

[45] *See generally* Thomas Hehir & Susan Gamm, *Special Education*, in *Law and School Reform* (Heubert ed.), *supra* at 213..

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> processes established by special-education law often results in an exaggerated focus on process instead of on the needs of individual children."[46]

A second major example here, indeed one that will define education for this decade and decades to come, is the matter of education reform. Such reform has been almost entirely law based, but too little attention has been paid to the way in which the sources and structure of law, and the attitude and training of lawyers, impose their own limitations on reform and its likely success.[47] Some surveys and research have discussed the extent to which "educational policy-making has been 'lawyerized'" and observed this to be a dangerous trend toward educators' loss of professional autonomy and sound educational policy-making.[48] As the Education Commission for the States has observed, we do not want only lawyers as our "gatekeepers" for legislative and legal school policy.[49] Nowhere is this more true than in the agenda for school reform where a significant role has need played by equity and adequacy litigation[50] for reform is illustrated in adequacy litigation:

> Ironically, the crucial lesson to be learned from past litigation is that if lawyers hope to alter the legal distribution of education fundamentally, they cannot rely, as they have in the past, primarily on traditional legal concepts and remedies. Instead, they must turn to advances in educational policy made outside the courtroom and shift their litigation to reflect the knowledge acquired by educators over the past few decades. While standards of equity revolve around concepts familiar to lawyers and legal discourse, a case built around a constitutional right to an 'adequate' education demands an educator's input.[51]

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[46] *Id.* at 207.

[47] *See generally e.g.* Todd DeMitchell & Richard Fossey, *The Limits of Law-Based School Reform: Vain Hopes and False Promises* (Technomic Pub. 1997); *Law and School Reform: Six Strategies for Promoting Educational Equity* (Jay P. Heubert ed., Yale U. Press 1998).; Todd A. DeMitchell, *The Legal Confines of School Reform*. AASA The School Administrator Web Edition (November 1997) <http://www.aasa.org/publications/sa/1997_11/DeMitchell.htm> (accessed October 21, 2001) ("Although the law has been the vehicle for launching school reform efforts, little attention has been paid to the way legal mechanisms enable and constrain effective school reform."). *See also* Stacie Rissman Joyce, *The School District Attorney: Trends of Legal Involvement in Education*, 10 NOLPE Sch. L.J. 193 (1983).

[48] McKinney *supra* n. 43 at 476.

[49] ECS, *supra* ERIC Document ED 203 455. *See also generally,* McKinney& Drake, *supra* n. 43 at 480; Andrew Trotter, *Flagrante Delicto,* 177 Am. Sch. Bd. J. 12, 13, 14 (Dec 1990); Herbert M. Kritzer, *Legal Advocacy: Lawyers and Non-lawyers at Work* (U. Mich. P.1998) at 10-11, 193. *See also, e.g.* Rapp, supra n. 27, at § 1.02(3)(a)(I). *But see* Suzanne R. Painter, *Superintendents and School District Attorneys: Who's In Charge Here*? 129 Educ. L. Rep. (1998) (suggesting that the policy role of attorneys may be overstated); *see also* Suzanne Painter, *School District Employment Practices Regarding School Attorneys*, 27 J.L. & Educ. 73 (1998).

[50] *See e.g.* Dayton supra n. 44.

[51] Molly S. McUsic, *School Finance* in Heubert ed., *supra* n. 20 at 90.

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Both reform and special education thus offer critical examples of the need for a new class of lawyers, those trained and open to education and children-centered issues, those whose skill set includes negotiation and mediation and long-term planning. They also offer examples of a new class of educator trained to understand and work successfully in the law and policy arenas.

CONCLUSION: TELL ME A NEW STORY

Although law has become almost omnipresent in school issues, the relationship between lawyers, law, child advocates, and educators does not seem to have improved commensurately. So much easier to think that all educators need to know is how to teach, all lawyers need to know is legal research and advocacy skills.

Given advantages like those discussed in the previous part of this paper, how much education should a lawyer know? At least enough to understand the impact of the key pieces of statutory and constitutional law. How much law should an educator know? Enough to assure that our educational institutions are reflecting society's core decisions on constitutional rights. Enough to anticipate legal problems and avoid them by preventive action, or, if not avoid them, at least know when to call for legal counsel early in the dispute. Enough to consider legal implications in policy setting and to participate appropriately in the legislative and administrative process, that is enough to be themselves the gatekeepers of the educational policy field. At least educators should demand and take that one ed law course, preferably one that is a relatively in depth survey of basic principles and introduction to legal reasoning.

Again, the opening stories are illustrative. Educators need some basic knowledge, not necessarily in depth, but with sufficient breadth, to know that symbols like a Star of David may have implications beyond gang activities, to know that students and parents have statutory privacy rights, to know the general parameters of free speech and due process. Beyond this, they would be well served with another course that deals with the civil rights issues, and perhaps a third that deals with the legislative and administrative system. Equally crucial, in light of liability and immunity standards, is educators' need to have access to conferences and seminars on a continuing education basis to keep current on legal developments.[52]

Dr. Ellenmorris Tiegerman, founder and Director of the School for Language and Communication Development, observes,

> the interface of education and law creates a nexus, which is both conceptual and pragmatic in nature. You are creating a new professional area that arises out of the plethora of cases in the field of education. The 'legal educator' can provide a holistic view of the complex issues, which have

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[52] *See e.g. Tips for the First Year Principal* 11/21/96 Clearing House 77, 1996 WL 11548237 The Clearing House. ("Keep current with changes and new programs. You simply must keep current regarding educational issues (school law, in particular).").

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> historically been handled by either educators or lawyers. It has been my experience that lawyers and educators are trained theoretically to function in different service contexts and, as a result, their viewpoints are limited by their separate training. Although they both contribute to part of the process, the translation of information often results in misunderstanding, miscommunication and limited thinking. The problem that presently exists is that educators and lawyers need to train in each other's field, to establish a common lexicon, theoretical framework and operational system to respond to issues that arise in schools.[53]

One way to achieve the cross-disciplinary expertise that Dr. Tiegerman suggests is through more interdisciplinary work, more encouragement by education administration advisors for their students' interest in law, more law professors opening their classes to educators and vice versa. Through these and related efforts, the response to the call for this new class of lawyers and educators remains will improve the understanding and workings of our education system for the benefit of those who work within and around it, and for the benefit of those children and students whom it serves.

[53] Redfield, *Thinking* at ix.

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